

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



July – September 2003

OPINIONS

DRIVERS' LICENSES – IMMIGRATION-RELATED DOCUMENTS AS PROOF OF IDENTITY; PROOF OF LAWFUL PRESENCE IN COUNTRY NOT REQUIRED

Question: May the Motor Vehicle Administration ("MVA") require an individual who presents foreign identification as part of an application for a Maryland driver's license also to produce documentation of legal presence in the United States?

Answer: MVA may require such an individual to provide additional identification and may include immigration-related documents among the acceptable forms of identification. However, the MVA may not deny a license because an applicant is unable to prove lawful presence in this country.

*Opinion No. 03-014
September 12, 2003*

EMERGENCY MEDICAL SERVICES – WORKERS' COMPENSATION – COMPENSATION AVAILABLE TO PUBLIC SAFETY PERSONNEL WHO UNDERGO VOLUNTARY SMALLPOX VACCINATION

A recent federal initiative encourages public safety personnel, such as law enforcement officers, firefighters, and emergency medical services personnel, to undergo voluntary smallpox vaccination as a precaution against contracting that disease when responding to a bioterrorist incident. As part of that initiative, Congress passed two laws addressing compensation of individuals who may suffer adverse effects from smallpox vaccination. One law, part of the Homeland Security Act of 2002, is designed to protect those who carry out the smallpox vaccination program, by shifting tort liability to the federal government and limiting that liability to fault-based claims under the Federal Tort

Claims Act. The other law, known as the Smallpox Emergency Personnel Protection Act of 2003 ("SEPPA"), creates a new no-fault federal remedy for those who are voluntarily vaccinated as part of the federal initiative or are infected by contact with a person who was so vaccinated.

Question: What compensation is available for a Maryland public safety worker who has an adverse reaction to his or her own vaccination or to the vaccination of a co-worker?

Answer: (1) Public safety personnel who are voluntarily vaccinated as part of the federal initiative and who suffer adverse reactions to their vaccinations will be eligible for benefits under SEPPA, if they meet the other requirements of that statute. Benefits under SEPPA are not based on fault, but will be reduced by the amount of any benefits received under the Maryland Workers' Compensation Act. To the extent that these personnel have claims against entities involved in the manufacture, distribution, or administration of the vaccine, they will be limited to asserting fault-based claims against the federal government under the Homeland Security Act, and any recovery under that act will be offset by compensation received under SEPPA.

(2) The two federal statutes specifically provide for compensation of an individual who is infected and suffers injury from contact with another individual vaccinated under the federal initiative. Thus, a Maryland public safety worker injured as a result of the vaccination of a co-worker will be eligible for compensation under federal law. Again, benefits under federal law will be offset by any compensation under the Maryland Workers' Compensation Act.

(3) It is likely that the Workers' Compensation Commission or a reviewing court would hold that adverse reactions or complications experienced by a public safety worker as a result of the voluntary vaccination of the worker or a co-worker as part of the federal program would qualify as accidental

injuries or occupational diseases under the Maryland Workers' Compensation Act.

*Opinion No. 03-012
August 29, 2003*

**GUBERNATORIAL APPOINTMENTS –
RECESS APPOINTMENTS TO
BALTIMORE CITY LIQUOR BOARD**

Question: If the Governor appoints an individual to the Board of License Commissioners for Baltimore City while the General Assembly is *not* in session, is Senate confirmation required?

Answer: Yes; confirmation is required for recess appointments.

*Opinion No. 03-013
September 2, 2003*

**LEGISLATIVE AUDITOR –
AUTHORITY TO EXAMINE FINANCIAL
DISCLOSURE STATEMENTS**

Question: On occasion, a member of the Legislative Auditor's staff, as part of the Auditor's official duties, reviews financial disclosure statements of public officials on file with the State Ethics Commission. Does the Public Ethics Law require the Ethics Commission to record the name and home address of the staff member and make that information available on request to the individuals who submitted the financial disclosure statements?

Answer: No; the Legislative Auditor is entitled to access to financial disclosure statements under provisions of the State Government Article independent of the Public Ethics Law.

*Opinion No. 03-011
August 5, 2003*

**ZONING AND PLANNING –
APPROVAL OF DEVELOPMENT RIGHTS
AND RESPONSIBILITIES AGREEMENTS**

Legislation pending before the Anne Arundel County Council would allow County officials to

enter into local development rights and responsibilities agreements, as authorized by Article 66B, §13.01.

Question 1: May a chartered county that derives its powers from Article 25A adopt legislation that creates a planning commission of the type authorized by §3.01 of Article 66B?

Answer: An ordinance creating a planning commission in a chartered county must be consistent with the county charter. The Anne Arundel County Charter currently implements the County's authority over planning and zoning by assigning functions to the Office of Planning and Zoning, the Planning Advisory Board, and the County Council. We defer to the County Attorney's opinion that legislation establishing the type of planning commission authorized by Article 66B would be inconsistent with the County Charter, unless it is amended.

Question 2: If the answer to Question 1 above is "yes," can that planning commission exercise the review powers of a planning commission under Article 66B, §13.01, concerning development rights and responsibilities agreements?

Answer: If the County Charter were amended to provide for a planning commission, that commission could exercise review and approval powers over development rights and responsibilities agreements, as contemplated in Article 66B, §13.01.

Question 3: Does the failure of the pending bill to provide for review of proposed development rights and responsibilities agreements by a county planning commission render the bill inconsistent with State law?

Answer: The bill provides for review of a proposed agreement by the County's Planning Advisory Board. Under §13.01, an ordinance need not provide for review by an entity named the "planning commission," so long as it provides for review by a similar entity familiar with the county land use plan.

Question 4: Does the bill's requirement that a developer's concept plan include a proposed development rights and responsibilities agreement render the bill inconsistent with the voluntary petition process in Article 66B, §13.01?

Answer: It is unclear whether the pending bill mandates that a developer submit a development rights and responsibilities agreement as part of a concept plan. If so, it would be inconsistent with §13.01, as the Legislature authorized local governments to create a voluntary process.

*Opinion No. 03-015
September 29, 2003*

ADVICE LETTERS

APPOINTMENTS – LOCAL SOCIAL SERVICES DIRECTORS

Section 13(b) of Article 88A specifies that permanent appointment of a local social services director must be by concurrent action of the State Secretary of Human Resources and an enumerated local government official or body.

Question 1: May the Governor or the Secretary of Human Resources unilaterally pick a director?

Answer: No; the statute does not specify a direct role for the Governor, and the Secretary of Human Resources cannot act unilaterally.

Question 2: How long can an individual serve as director in an acting or interim capacity?

Answer: An acting appointment cannot last indefinitely, and a permanent appointment should be made with reasonable promptness.

Question 3: Can the Governor or the Board of Public Works deny funding for a local department of social services, to force the enumerated local government official or body to approve the Secretary of Human Resources' choice of director?

Answer: As a matter of State law, nothing precludes the Governor from under-funding local social services or any local department, and the Board of Public Works' action in reducing the budget under §7-213 of the State Finance Article would not be subject to judicial review for arbitrariness. Thus, there may be no judicial remedy if funding for a local department is reduced or denied to force concurrence with the Secretary of Human Resources' choice.

*Letter to
Delegate Howard P. Rawlings
September 23, 2003*

AVIATION – FEDERAL PREEMPTION OF STATE REGULATION

Question: May the State enact and enforce legislation that would limit flight activities at private airports operating in residential communities?

Answer: No; federal law preempts State regulation in the areas of aircraft noise, airport and aircraft safety, and activities that affect the use of airspace or have the effect of controlling air navigation.

*Letter to
Delegate Darryl A. Kelley
September 8, 2003*

BAINBRIDGE DEVELOPMENT CORPORATION – TENURE OF APPOINTED DIRECTORS

Under its governing statute, the Board of Directors of the Bainbridge Development Corporation has six non-voting *ex officio* members and nine members appointed by the Board of County Commissioners of Cecil County, in some cases on the recommendation of other public officials. The statute gives appointed members 4-year terms and does not state that these members serve at the pleasure of any other entity or otherwise provide for removal.

Question: Do appointed Board members serve at the pleasure of, thereby making them subject to removal by, any appointing or recommending authority?

Answer: No; the appointed directors have fixed 4-year terms. Neither Article 25, §3(d)(1), which gives county commissioners authority, with exceptions, to provide for the appointment and removal of county officers and employees, nor Article II, §15 of the Maryland Constitution, which permits the Governor to remove civil officers that he has appointed, applies. Moreover, the general rule that the power of removal follows the power of appointment is inapplicable when the officer is appointed to a term of years.

*Letter to
Delegate David D. Rudolph
July 3, 2003*

**BUDGET CONDITIONS – AUTHORITY OF
STATE AGENCY TO ADOPT
IMPLEMENTING REGULATIONS**

The Budget Reconciliation and Financing Act (Chapter 203, Laws of 2003) amended the Maryland Children's Health Program ("MCHP") statute and reenacted the authority of the Department of Health and Mental Hygiene ("DHMH") to "adopt regulations to implement" §15-303.1, which set out family income eligibility requirements for Program enrollees. Language in the budget bill (Chapter 202, Laws of 2003) provided that during FY 2004 DHMH "may not enroll [in the MCHP] any new children" with family incomes exceeding 200% of the federal poverty level.

Question: Is DHMH authorized to adopt regulations implementing the budget bill enrollment restrictions?

Answer: Yes; DHMH has authority to adopt regulations reflecting a budget condition.

*Letter to
Senator Lisa A. Gladden
July 10, 2003*

**CABLE TELEVISION REPAIR SERVICE –
FEDERAL LAW PREEMPTION**

A State legislative proposal would reinforce existing, identical federal requirements by requiring a cable television company to give a customer a 4-hour window for any repair appointment, and to give the customer notice if it finds that it is unable to appear during the scheduled window of time.

Question 1: Is this legislation preempted by federal law?

Answer: No; federal law authorizes the Federal Communications Commission to establish customer service standards in a variety of areas, including service calls, but does not generally prohibit a state from enacting or enforcing more restrictive consumer protection laws, so long as they are not inconsistent with federal law. Since the proposed State law simply reflects existing federal requirements, it is clearly not preempted.

Question 2: If enforcement of the provision involved possible reduction of a customer's bill,

would the enforcement provision be preempted by federal law?

Answer: No; penalizing a company for a violation by requiring a reduction of the customer's bill would not exceed the State's authority to regulate in the area of customer service or its significantly limited authority in the area of rate regulation.

*Letter to
Delegate Neil Quinter
August 29, 2003*

**CONSTITUTIONAL LAW –
WARRANTLESS ARRESTS**

Chapter 339, Laws of Maryland 2003, codified as part of Criminal Procedure Article, §2-209, authorized Montgomery County fire and explosives investigators to make warrantless arrests for certain felonies related to arson and explosive devices.

Question: Is this law consistent with Article 26 of the Maryland Declaration of Rights, which condemns search and seizure warrants not made under oath or affirmation, as well as warrants not specifically naming or describing the place to be searched or the person or property to be seized?

Answer: Yes; the Declaration of Rights must be construed as consistent with the Fourth Amendment to the United States Constitution, which allows warrantless arrests under certain circumstances. Moreover, the Court of Appeals of Maryland has held that Article 26 permits warrantless arrests in appropriate cases. Therefore, while an individual arrested under Chapter 339 could challenge the constitutionality of the arrest or the application of the statute, the statute is not unconstitutional on its face.

*Letter to
Delegate Don Dwyer, Jr.
September 16, 2003*

**CRIMINAL LAW – EFFECT OF SUPREME COURT
RULING ON STATUTES PROSCRIBING
SODOMY AND UNNATURAL AND PERVERTED
SEXUAL PRACTICES**

In *Lawrence v. Texas*, 123 S. Ct. 2472 (June 26, 2003), the Supreme Court held that a Texas statute, making it a crime for two persons of the

same sex to engage in certain intimate sexual conduct, violated the Due Process Clause.

Question: Does the Supreme Court's decision require the General Assembly to repeal Criminal Law Article, §3-321 (sodomy) and §3-322 (unnatural and perverted sexual practices)?

Answer: No; the decision does not require, but would permit, repeal. However, the statutes in question could not be enforced against consenting adults for private, noncommercial conduct.

*Letter to
Delegate Richard S. Madaleno, Jr.
July 10, 2003*

EDUCATION – PUBLIC SCHOOL BUS SAFETY REQUIREMENTS

Question: Can the county boards of education in Somerset, Wicomico, and Worcester Counties impose by contract special safety requirements for school buses that have been operated for 12 or more years, in light of a 2003 amendment of State law loosening general safety requirements in those counties?

Answer: Yes; the 2003 legislation did not limit the existing authority of the county boards of education, by contract, to establish bus safety requirements stricter than those now mandated by law for older buses in those counties.

*Letter to
Delegate Bennett K. Bozman
August 29, 2003*

FAMILY LAW – IS TRANSEXUAL CAPABLE OF MARRIAGE?

Question: Does a post-operative transsexual have the capacity under Maryland law to enter into a valid marriage with an individual of the transsexual's birth gender?

Answer: No Maryland statute directly answers the question, and the Court of Appeals of Maryland explicitly declined to address it in a recent case. However, the implication of the Court's opinion is that a transsexual who has undergone successful

sexual reassignment surgery may enter into a valid marriage with a person of the transsexual's birth gender.

*Letter to
Christine B. Oliver, Esquire
Social Security Administration
August 15, 2003*

LEGISLATIVE AUDITOR – REPORTING AND CONFIDENTIALITY OF MISCELLANEOUS INFORMATION

State Government Article, §2-1220 *et seq.*, charge the Office of Legislative Audits ("OLA") with responsibility to investigate fraud, waste, or abuse in connection with State funds. The statute distinguishes audits and reviews, the results of which must be reported and distributed, from investigations, the results of which are not addressed.

Question 1: Must OLA follow the reporting and distribution requirements of the statute with respect to investigation results, or may it adopt an internal policy about reporting the results of investigations?

Answer: OLA may adopt an internal policy on the matter.

Question 2: What is the confidentiality of OLA general correspondence, which may contain detailed information about audit issues and findings?

Answer: Under the Public Information Act ("PIA"), routine or general correspondence from OLA to such parties as the General Assembly or State agencies is not confidential unless it relates to an ongoing audit or would reveal confidential audit or review information. Certain communications may be privileged on various grounds. Copies of letters from State agencies to the Joint Audit Committee are likely not privileged unless they reveal confidential audit or review information. In some situations, the PIA exemption for investigative correspondence may apply.

Question 3: Is information obtained on OLA's fraud hotline confidential?

Answer: The information is generally not obtained during an audit or review and is thus not confidential under State Government Article, §2-

1226. However, some information may be protected from inspection by a person in interest under the PIA exemption for investigatory files.

Question 4: Can OLA disclose confidential information involving possible criminal activity to law enforcement authorities in advance of a required report?

Answer: The OLA statute requires certain reports to the Attorney General and the appropriate State's Attorney. Sharing information with federal law enforcement officers may be authorized, subject to caveats, but this would best be done through the State's law enforcement authorities.

*Letter to
Brian S. Losover & Timothy W. Timanus
Office of Legislative Audits
August 12, 2003*

MARYLAND CONDOMINIUM ACT – INSURANCE

The Maryland Condominium Act requires a condominium association to obtain a master insurance policy, with specified coverages and terms, "to the extent reasonably available."

Question 1: Would the high cost of a master condominium insurance policy render the coverage not "reasonably available" under the Act?

Answer: Only in very rare circumstances. While cost may be a factor in determining whether particular coverage is reasonably available, a policy would ordinarily be considered reasonably available even if the premium or deductible increased substantially.

Question 2: Can individual policies purchased by each unit owner (so long as they include coverage for the entire unit) be deemed the equivalent of the master insurance policy required by the Act?

Answer: No; it is unlikely that these individual policies will in the aggregate satisfy the statutory requirement for a master insurance policy.

*Letter to
Delegate Elizabeth Bobo
July 11, 2003*

PETITIONS – USE OF PUBLIC FUNDS AND RESOURCES TO SUPPORT REFERENDUM

The Board of County Commissioners of Caroline County repealed provisions granting a real property tax differential for property located within municipalities both having and not having municipal sewer and water services, thus raising the property tax rates paid by owners of property within the municipalities. An effort was undertaken to petition the repeal bill to referendum.

Question: May municipalities in Caroline County use public funds and resources to support a campaign to bring to referendum legislation passed by the Board of County Commissioners?

Answer: Yes; the petition drive is one on which municipalities may legitimately spend public funds and to which they may devote public resources.

*Letter to
Senator Richard F. Colburn
July 22, 2003*

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